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18 UNITED STATES DISTRICT COURT

19 DISTRICT OF NEVADA

20 OAKTREE CAPITAL MANAGEMENT, L.P.,  
21 et al.,

22 Plaintiffs,

23 v.

24 KPMG, KPMG INTERNATIONAL  
COOPERATIVE, KPMG LLP, HANSEN,  
25 BARNETT & MAXWELL, P.C., and  
MORGAN STANLEY & CO.,

26 Defendants.

Case No. 12-CV-00956-JCM-(GWF)

**JOINT MOTION FOR ENTRY OF  
CONTRIBUTION BAR ORDER AND  
FINAL JUDGMENT OF VOLUNTARY  
DISMISSAL WITH PREJUDICE  
PURSUANT TO RULE 54(b) AS TO  
DEFENDANTS KPMG, KPMG  
INTERNATIONAL COOPERATIVE,  
AND KPMG LLP; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

1 Plaintiffs Oaktree Capital Management, L.P., Lazard Asset Management LLC, Angelo,  
 2 Gordon & Co., L.P., Zazove Associates, LLC, CNH Partners, LLC, Advent Capital Management,  
 3 LLC, AQR Capital Management, LLC, HFR CA Lazard Rathmore Master Trust, and Delaware  
 4 Public Employees' Retirement System (collectively, "Plaintiffs") and Defendants KPMG, a Hong  
 5 Kong partnership ("KPMG HK"), KPMG International Cooperative ("KPMG International") and  
 6 KPMG LLP (collectively, the "KPMG Parties"), hereby jointly move this Court for an Order (i)  
 7 entering a Contribution Bar Order; (ii) dismissing Plaintiffs' claims against the KPMG Parties  
 8 with prejudice; and (iii) entering a final judgment as to the KPMG Parties pursuant to Fed. R.  
 9 Civ. P. 54(b). A Proposed Contribution Bar Order and Final Judgment is attached hereto as  
 10 Exhibit A.

# 11 MEMORANDUM OF POINTS AND AUTHORITIES

## 12 **I. BACKGROUND**

13 On June 6, 2012, Plaintiffs Oaktree Capital Management, L.P.; Lazard Asset Management  
 14 LLC; Angelo, Gordon & Co. L.P.; Zazove Associates, LLC; CNH Partners, LLC; Advent Capital  
 15 Management, LLC; AQR Capital Management, LLC; and HFR CA Lazard Rathmore Master  
 16 Trust filed an action in this Court alleging violations of state and federal securities laws by the  
 17 KPMG Parties, Morgan Stanley & Co. ("Morgan Stanley"), and Hansen, Barnett & Maxwell P.C.  
 18 ("Hansen") (collectively, the "Defendants"), captioned *Oaktree Capital Management, L.P. v.*  
 19 *KPMG*, Civ. Act. No. 2:12-cv-00956-JCM(GWF) (the "*Oaktree Complaint*"). Also on June 6,  
 20 2012, the Delaware Public Employees' Retirement System filed a separate action against the  
 21 Defendants in this Court alleging similar facts and allegations as the *Oaktree Complaint*,  
 22 captioned *Delaware Public Employees' Retirement System v. KPMG*, Civ. Act. No. 2:12-cv-  
 23 00961-JCM(GWF) (together with the *Oaktree Complaint*, "the Complaints").

24 On November 13, 2012, Plaintiffs filed a stipulation with the Court to consolidate the two  
 25 cases into one action (the "Action"). The Court granted the request and on November 21, 2012,  
 26 Plaintiffs filed a Consolidated Complaint against the Defendants in this Action. The  
 27 Consolidated Complaint alleged, among other things, that KPMG HK's and Hansen's audit  
 28 opinions concerning ShengdaTech, Inc.'s financial statements violated Section 18 of the

1 Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §78r. The Consolidated  
 2 Complaint further alleged that KPMG International and KPMG LLP are liable pursuant to  
 3 Section 20(a) of the Exchange Act, 15 U.S.C. §78t(a), for KPMG HK’s alleged violations of  
 4 Section 18.

5 On January 7, 2013, the Defendants moved to dismiss the Consolidated Complaint  
 6 pursuant to Fed. R. Civ. P. Rules 9(b) and 12(b)(6). On August 5, 2013, the Court issued an order  
 7 granting the Defendants’ motion to dismiss the Consolidated Complaint, but providing that  
 8 Plaintiffs may request leave to file an amended complaint with respect to certain of the dismissed  
 9 claims within forty-five (45) days after the date of the order. Plaintiffs timely moved the Court  
 10 for leave to file an Amended Consolidated Complaint, and the Defendants opposed that motion.  
 11 Oral argument was heard on the Motion by the Hon. Magistrate Judge Foley on December 17,  
 12 2013. The Motion was taken under submission and a ruling has not been issued.

13 Plaintiffs, on their behalf and on behalf of the funds they manage, and the KPMG Parties  
 14 have agreed to resolve and settle the claims between them in the Action on the terms and subject  
 15 to the conditions set forth in the parties’ Settlement and Release Agreement, which was fully  
 16 executed as of February 11, 2014 (“Settlement Agreement”). The effectiveness of the Settlement  
 17 Agreement is expressly conditioned upon the entry of a Contribution Bar Order in favor of the  
 18 KPMG Parties in accordance with the Private Securities Litigation Reform Act of 1995, codified  
 19 as amended at 15 U.S.C. § 77a (2000) (hereinafter referred to as the “PSLRA”).<sup>1</sup>

## 20 **II. LEGAL ARGUMENT**

### 21 **A. The Parties Jointly Request Entry of a Contribution Bar Order**

22 Plaintiffs and the KPMG Parties jointly request that the Court enter an Order in the form  
 23 attached hereto as Exhibit A, discharging the KPMG Released Parties<sup>2</sup> from all claims for

24 <sup>1</sup> The PSLRA applies by virtue of Plaintiffs’ assertion of federal securities claims against the  
 25 KPMG Parties pursuant to Sections 18 and 20(a) of the Exchange Act.

26 <sup>2</sup> As defined in the proposed Contribution Bar Order, “KPMG Released Parties” includes the  
 27 KPMG Parties and all other member firms of the KPMG network of independent firms affiliated  
 28 with KPMG International Cooperative that provide audit, tax and/or advisory services, and their  
 respective past and present parent companies, subsidiaries, divisions, affiliates, related entities,

1 contribution and for equitable indemnity to any person or entity, including other Defendants  
 2 named in this Action, whether arising under state, federal or common law in any jurisdiction,  
 3 based upon, arising from, relating to or in connection with the Released Claims<sup>3</sup> (the  
 4 “Contribution Bar Order”). The proposed Contribution Bar Order is in accordance with the  
 5 PSLRA, which provides that:

6 A covered person who settles any private action at any time before final verdict or  
 7 judgment shall be discharged from all claims for contribution brought by other  
 8 persons. Upon entry of the settlement by the court, the court shall enter a bar  
 9 order constituting the final discharge of all obligations to the plaintiff of the  
 10 settling covered person arising out of the action. The order shall bar all future  
 11 claims for contribution arising out of the action— (i) by any person against the  
 settling covered person; and (ii) by the settling covered person against any person,  
 other than a person whose liability has been extinguished by the settlement of the  
 settling covered person.

12 15 U.S.C. § 78u-4(f)(7)(A).

13 The PSLRA explicitly provides a judgment reduction formula in favor of non-settling  
 14 defendants, which states as follows:

15 If a covered person enters into a settlement with the plaintiff prior to final verdict  
 16 or judgment, the verdict or judgment shall be reduced by the greater of-- (i) an  
 17 amount that corresponds to the percentage of responsibility of that covered person;  
 or (ii) the amount paid to the plaintiff by that covered person.

18 15 U.S.C. § 78u-4(f)(7)(B). The parties’ proposed Contribution Bar Order acknowledges that  
 19 nothing therein shall affect any non-settling defendant’s right to any such judgment reduction  
 20 credit or set-off. *See* Exhibit A, ¶ 2.

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21  
 22 joint ventures, predecessors, successors and assignees, and all their respective present and former  
 23 agents, subcontractors, subrogees, insurers, co-insurers, reinsurers, attorneys, and all their  
 24 respective present and former partners, principals, members, directors, officers, employees,  
 stockholders and owners.

25 <sup>3</sup> As set forth in the proposed Contribution Bar Order, the Released Claims encompass any and all  
 26 Claims and Unknown Claims as defined in the Settlement Agreement of any nature whatsoever in  
 27 any jurisdiction that Plaintiffs ever had, now have, or can, shall or may have against the KPMG  
 28 Released Parties that (a) arise out of or in any way relate to the Action or the facts, transactions,  
 allegations, and/or claims of liability described in the Action, or (b) were brought or alleged, or  
 could have been brought or alleged in the Action and that relate in any way to (i) the Plaintiffs’  
 investments in any securities issued by ShengdaTech, Inc.; or (ii) any work performed by the  
 KPMG Released Parties for or related to ShengdaTech, Inc. at any time.

Because any future judgment against a non-settling defendant will be reduced by *at least* the amount of the settling defendants' *actual proportionate share of liability established at trial*, and not just by the settlement amount paid by the settling defendant, the non-settling defendants' rights are fully protected and it is not necessary to conduct a fairness hearing or good faith determination concerning the proposed settlement. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 02 CIV. 3288 (DLC), 2005 WL 613107 (S.D.N.Y. Mar. 15, 2005) ("Where a judgment credit is given to a non-settling defendant in an amount equal to its proportionate share of liability, its rights 'are protected even without a determination of the fairness of the settlement.'"); *Gerber v. MTC Elec. Technologies Co., Ltd.*, 329 F.3d 297, 303 (2d Cir. 2003) ("By awarding a credit that is at least the settling defendants' proven share of liability, the non-settling defendants' rights are protected even without a determination of the fairness of the settlement."); *In re Cendant Corp. Litig.*, 264 F.3d 286, 298 (3d Cir. 2001) (same).

Therefore, Plaintiffs and the KPMG Parties respectfully request that the Court enter the proposed Contribution Bar Order, attached as Exhibit A.<sup>4</sup>

**B. Provided That The Contribution Bar Order Is Entered, The Parties Jointly Request Dismissal Of The Action With Prejudice As Against the KPMG Parties**

Entry of a Contribution Bar Order as described above will satisfy the last remaining condition to the effectiveness of the parties' settlement. Accordingly, the parties jointly request that, in conjunction with its entry of the Contribution Bar Order, the Court dismiss with prejudice Plaintiffs' claims in the Action against the KPMG Parties, in accordance with Fed. R. Civ. P. 41(a)(2).<sup>5</sup>

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<sup>4</sup> This Court previously entered a Contribution Bar Order in connection with a settlement of Plaintiffs' claims against former defendant Morgan Stanley, barring future claims for contribution and equitable indemnity against named defendant Morgan Stanley and all other underwriters participating in ShengdaTech, Inc.'s December 2010 issuance of 6.5% notes. (Docket No. 161). The parties' request for that Contribution Bar Order was made pursuant to Nevada state law, rather than the PSLRA, because Plaintiffs' claims against Morgan Stanley did not include any claims under the federal securities laws.

<sup>5</sup> In the event the Contribution Bar Order is not entered as requested, Plaintiffs and the KPMG Parties respectfully request that the Court *not* enter a judgment of dismissal at this time, because non-entry of the Contribution Bar Order may result in termination of the settlement.

1           **C.       A Rule 54(b) Judgment Is Warranted**

2           Plaintiffs and the KPMG Parties also request that the Court certify as a final  
3 judgment, pursuant to Fed. R. Civ. P. 54(b), its order(s) dismissing Plaintiffs' claims against the  
4 KPMG Parties and entering the Contribution Bar Order. Federal Rule of Civil Procedure 54(b)  
5 states:

6           **(b) Judgment on Multiple Claims or Involving Multiple Parties.**

7           When an action presents more than one claim for relief—whether as a  
8 claim, counterclaim, crossclaim, or third-party claim—or multiple parties  
9 are involved, the court may direct the entry of a final judgment as to one  
10 or more, but fewer than all, claims or parties only if the court expressly  
11 determines that there is no just reason for delay. Otherwise, any order  
12 or other decision, however designated, that adjudicates fewer than all  
13 the claims or the rights and liabilities of fewer than all the parties does  
14 not end the action as to any of the claims or parties and may be revised  
15 at any time before the entry of judgment adjudicating all claims and all  
16 the parties rights and liabilities.

17           Fed. R. Civ. P. 54(b) (emphasis added).

18           This Court has previously entered a Rule 54(b) judgment with respect to Plaintiffs' claims  
19 against Morgan Stanley, based on the settlement reached between those parties. (Docket No. 161.)  
20 There is likewise no just reason for delaying the entry of a final judgment with respect to  
21 Plaintiffs' claims against the KPMG Parties. Plaintiffs and the KPMG Parties have fully and  
22 finally resolved all of the claims between them by agreement, and the interest of promoting  
23 settlements will be furthered by the entry of a final judgment as to Plaintiffs' claims against the  
24 KPMG Parties and the entry of a Contribution Bar Order. Once the Court dismisses the claims  
25 against the KPMG Parties with prejudice and enters the Contribution Bar Order, it resolves all  
26 claims against the KPMG Parties. There is no just reason for delay, and therefore the parties  
27 request that the Court certify as final its order dismissing Plaintiffs' claims against the KPMG  
28 Parties and entering the Contribution Bar Order.

1     **III.     CONCLUSION**

2             Based upon the foregoing, Plaintiffs and the KPMG Parties jointly request that the Court:  
3     (1) enter a Contribution Bar Order in the form attached hereto as Exhibit A, (2) dismiss with  
4     prejudice all claims in the Action against the KPMG Parties; and (3) find that no just reason exists  
5     to delay and, thus, certify the foregoing Order(s) as a final judgment as to the KPMG Parties  
6     pursuant to Fed. R. Civ. P. 54(b).

7     DATED: February 24, 2014             FENNEMORE CRAIG JONES VARGAS

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              *on behalf of their managed funds and accounts*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing **Joint Motion** was served on the 24th day of February, 2014 via the Court's CM/ECF electronic filing system addressed to all parties on the e-service list.

/s/ J. Colby Williams  
An employee of Campbell & Williams